

RECEIVED



2005 JUL 27 PM 3:03

BellSouth Telecommunications, Inc  
333 Commerce Street  
Suite 2101  
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks  
General Counsel

615 214 6301  
Fax 615 214 7406

T.R.A. DOCKET ROOM  
July 27, 2005

VIA HAND DELIVERY

Hon. Ron Jones, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Petition of ITC^DeltaCom Communications, Inc. for Mediation of  
Certain Issues*  
Docket No. 05-00174

Dear Chairman Jones:

Enclosed are the original and fourteen copies of BellSouth's *Motion to Dismiss*.  
Copies of the enclosed are being provided to counsel of record.

Very truly yours,

A handwritten signature in black ink, appearing to read "Guy M. Hicks", written over a horizontal line.

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition of ITC^DeltaCom Communications, Inc. for Mediation of Certain Issues*

Docket No. 05-00174

**BELLSOUTH'S MOTION TO DISMISS**

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this motion to dismiss the *Petition of ITC^DeltaCom* ("DeltaCom") *for Mediation and Dispute Resolution* ("Petition").

**INTRODUCTION**

The appropriate place for DeltaCom to litigate change of law issues is in the Authority's generic change of law proceeding, Docket No. 04-00381, not in a two-party proceeding. The Authority established the generic proceeding so that it could determine in the most efficient manner what changes are required in existing interconnection agreements ("ICAs") between BellSouth and CLECs, including DeltaCom, as a result of recent FCC Orders. DeltaCom, as an individual entity, has intervened in the generic change of law proceeding. DeltaCom, as a member of CompSouth, has actively participated in the generic docket. DeltaCom has, nevertheless, recently filed a separate, individual change of law *Petition*.

DeltaCom is the only CLEC that has sought to initiate its own change of law proceeding. DeltaCom requests that the Authority appoint a mediator to attempt to assist the parties in resolving change of law issues and to make findings of fact and conclusions of law as to those issues the parties do not resolve. It would be

inefficient and inconsistent with the purpose of the generic change of law proceeding to allow DeltaCom to litigate change of law issues outside of the generic proceeding. Consequently, the Authority should dismiss DeltaCom's *Petition*.

The Authority also should deny DeltaCom's request that the Authority appoint a mediator to take part in change of law negotiations between BellSouth and DeltaCom. The parties' ICA does not require, nor even mention, mediation. To the extent DeltaCom relies on the 1996 Act as a basis for requesting mediation, the federal legislation does not compel mediation. A private mediation of issues that affect most, if not all, CLECs would hardly be fruitful, and would take up what is already a limited time that the parties and the Authority have to resolve important change of law issues. The Authority, to BellSouth's knowledge, has never *required* that a party mediate a dispute, and there is no reason for it to depart from precedent here.

### **DISCUSSION**

**The ICA between BellSouth and DeltaCom.** The effective ICA that governs the relationship between DeltaCom and BellSouth allows either party to request that the agreement be amended to reflect any changes in law that impact the parties' obligations under their ICA. The ICA also states that a party may petition the Authority to resolve any dispute over incorporating changes in law. DeltaCom quotes the relevant portions of the change of law and dispute resolution provisions of the ICA in paragraphs 11 and 12 of its *Petition*.

BellSouth and DeltaCom agree that their ICA is not compliant with current law. BellSouth requested that the parties negotiate amendments to their ICA to bring it into compliance with recent changes in the law and, although the parties have had discussions towards that end, they have not successfully negotiated amendments.

**The Authority's generic change of law proceeding.** In anticipation of the potential for duplicative litigation, and because the change of law issues arising out of the FCC's recent orders affect most, if not all, CLECs in the same manner, BellSouth petitioned the Authority to open what is now Docket No. 04-00381, the generic change of law proceeding. Specifically, BellSouth requested that the Authority determine what changes the FCC's recent decisions require in existing ICAs between BellSouth and certain CLECs.<sup>1</sup> On January 10, 2005, the Authority voted unanimously to establish a generic docket "to resolve change-of-law issues associated with the recent FCC decisions and orders."<sup>2</sup>

**DeltaCom's participation in the generic docket.** DeltaCom intervened in the generic change of law docket on July 1, 2005.<sup>3</sup> DeltaCom stated in its Petition that it "has participated in this docket as a member of CompSouth from the time of the docket's inception." DeltaCom also stated in its Petition that it will continue to participate in the generic docket as a part of CompSouth.<sup>4</sup> The

---

<sup>1</sup> More than 100 CLECs have negotiated commercial agreements with BellSouth. Moreover, numerous CLECs have also negotiated change of law amendments to their ICAs.

<sup>2</sup> See *Order Opening Generic Docket and Appointing a Hearing Officer*, at p. 2, entered Feb. 8, 2005 in Docket No. 04-00381 the Authority also voted unanimously to appoint Director Tate as Hearing Officer

<sup>3</sup> See DeltaCom's *Petition to Intervene* in Docket No. 04-00381, filed July 1, 2005.

<sup>4</sup> *Id* at 1.

Hearing Officer granted DeltaCom's *Motion to Intervene* on July 21, 2005 during the Status Conference. DeltaCom has therefore acknowledged that even before it formally intervened in the Tennessee proceeding, DeltaCom participated actively in the regional generic change of law proceeding. For example, its representatives took part in numerous conference calls between CLECs and BellSouth to discuss and negotiate the joint issues list filed in the generic change of law proceeding in Tennessee on June 29, 2005. Moreover, the join issues matrix states that it was agreed to between BellSouth, the member companies of CompSouth, SECCA, US LEC, XO, and Sprint. DeltaCom is a member company of CompSouth. Indeed, its Vice President for Government and Industry Affairs, Jerry Watts, is the President of CompSouth. It is undisputed that DeltaCom will continue to participate in the Authority's generic proceeding both as an individual intervenor and as a member of CompSouth. There is no basis for convening a separate, duplicative proceeding for DeltaCom.

**DeltaCom's duplicative individual change of law *Petition*.**

Notwithstanding the Authority's clear intention that *all* change of law issues would be addressed in a single generic docket, DeltaCom filed its *Petition* seeking to establish this separate, individual change of law docket. Notably, even though most, if not all, CLECs have a change of law clause in their ICA that is materially the same as the provision in DeltaCom's ICA with BellSouth, DeltaCom is the only CLEC that filed a separate, individual change of law proceeding. Many of the issues set forth in DeltaCom's *Petition* are the *exact* issues that the Authority will resolve its generic change of law proceeding. For

example, DeltaCom's Issue No. 1 asks whether the Authority has the authority to order BellSouth to provide UNEs pursuant to some authority other than Section 251 of the 1996 Act and, if it does, what the rates, terms, and conditions should be. That is Issue No. 8 on the joint issues matrix filed in the generic proceeding. Another example is DeltaCom's Issue No. 14, addressing Routine Network Modifications, which is the same issue as Issue No. 26 in the generic case.<sup>5</sup> Moreover, pursuant to the agreement between BellSouth and the CLECs, DeltaCom could have raised any additional change of law issue on or before June 29, 2005, for resolution in the generic case.

In addition to those DeltaCom change of law issues that clearly on their face parallel an issue set forth on the joint issues matrix in the generic proceeding, most of DeltaCom's remaining issues are subsumed within a more broadly phrased issues in the generic case. For example, DeltaCom acknowledges that Issue No. 5 in its *Petition* arises as a result of the FCC's rules regarding commingling. Issue No. 14 in the generic case asks broadly what language should be included in ICAs to implement commingling.<sup>6</sup> In negotiating

---

<sup>5</sup> The following is a list of issues set forth in DeltaCom's *Petition* for an individual change of law proceeding that mirror issues the parties, including DeltaCom, agreed to resolve in the generic change of law docket. DeltaCom Issue 1/Generic Issue 8; DeltaCom Issue 4/Generic Issue 4; DeltaCom Issue 9/Generic Issue 16; DeltaCom Issue 12/Generic Issue 14; DeltaCom Issue 14/Generic Issue 26; DeltaCom Issue 15/Generic Issue 28; DeltaCom Issue 18/Generic Issue 24; DeltaCom Issue 19/Generic Issue 2; DeltaCom Issue 21;/Generic Issues 11 and 12; DeltaCom Issue 22/Generic Issues 11 and 12; DeltaCom Issue 30/Generic Issue 20; DeltaCom Issue 31/Generic Issue 20; DeltaCom Issue 32/Generic Issue 10; DeltaCom Issue 33/Generic Issue 26; DeltaCom Issue 35/Generic Issue 19; DeltaCom Issue 36/Generic Issue 9; DeltaCom Issue 38/Generic Issue 10; DeltaCom Issue 40/Generic Issues 15 and 29; DeltaCom Issue 42, Generic Issue 22; DeltaCom Issue 43/Generic Issue 8; DeltaCom Issue 44/Generic Issue 30.

<sup>6</sup> The following is a list of issues set forth in DeltaCom's *Petition* for an individual change of law proceeding that are subsumed within issues that the parties, including DeltaCom, agreed to resolve in the generic change of law docket. DeltaCom Issue 2/Generic Issue 10; DeltaCom Issue 3/Generic Issue 15, DeltaCom Issue 7/Generic Issue 3, DeltaCom Issue 8/Generic Issue 15;

the joint issues matrix for the generic docket, the parties (including DeltaCom) deliberately worded issues broadly so that they could litigate any sub-issues included within the broader issue. For those sub-issues, DeltaCom is free to propose language and offer testimony in support of such language in the generic proceeding.

**DeltaCom's Petition is inappropriate and should be dismissed.** The Authority has previously decided that it will address *all* change of law issues in one generic proceeding, and not in hundreds of individual proceedings for each CLEC and/or each ICA. There is no legitimate basis for DeltaCom to have its own change of law proceeding. Allowing it to do so would thwart the efforts of all other carriers and the Authority to address change of law issues in an efficient and timely manner. DeltaCom has a forum in which it should have raised any appropriate change of law issue.

To the extent DeltaCom's *Petition* seeks to raise issues that do not result from recent changes in the law, those issues are not appropriate for resolution in the generic proceeding or in a separate proceeding brought pursuant to the change of law provision in the parties' ICA.<sup>7</sup> DeltaCom cannot simply change terms of its existing agreement that it does not like and that do not arise from changes in law through the guise of lumping them into a change of law *Petition*.

---

DeltaCom Issue 10/Generic Issue 10; ITC Issue 11/Generic Issue 4; DeltaCom Issue 16/Generic Issue 28, DeltaCom Issue 17/Generic Issue 28, DeltaCom Issue 24/Generic Issue 26; DeltaCom Issue 25/Generic Issue 26; DeltaCom Issue 37/Generic Issue 2, DeltaCom Issue 39/Generic Issue 2; DeltaCom Issue 41/Generic Issue 10.

<sup>7</sup> BellSouth is not in this Response setting forth its substantive position with respect to each issue set forth in DeltaCom's Petition. If the Authority does not dismiss DeltaCom's Petition, which is what it should do, BellSouth reserves its right to respond further in pleadings and/or testimony, as may be ordered by the Authority

A two-party mediation of generic change of law issues would not be appropriate in any event. Even if the Authority did not dismiss DeltaCom's Petition, which it should, it should not order the parties to enter into mediation over change of law issues. The parties' ICA makes no mention of mediation. The 1996 Act likewise does not require the appointment of a mediator. As the Hearing Officer has made clear to the parties, no CLEC is precluded from continuing to negotiate with BellSouth during the pendency of this proceeding. BellSouth continues to negotiate change of law terms with various CLECs, and would be pleased to continue to negotiate with DeltaCom. With the generic proceeding pending, however, even if the appointment of a mediator were otherwise appropriate, the Authority should not appoint one here. It would be a waste of time under the circumstances.

### CONCLUSION

For the reasons set forth above, the Authority should dismiss DeltaCom's *Petition* in its entirety.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks  
Joelle J. Phillips  
333 Commerce Street, Suite 2101  
Nashville, TN 37201-3300  
615/214-6301

R. Douglas Lackey



Meredith E. Mays  
675 W. Peachtree St., NE, Suite 4300  
Atlanta, GA 30375

## CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Henry Walker, Esquire  
Boult, Cummings, et al.  
1600 Division Street, #700  
P. O. Box 340025  
Nashville, TN 37203  
[hwalker@boultcummings.com](mailto:hwalker@boultcummings.com)

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

David Adelman, Esquire  
Charles B. Jones, III, Esquire  
Frank D LoMonte, Esquire  
Sutherland Asbill & Brennan  
999 Peachtree Street, NE  
Atlanta, GA 30309  
[david.adelman@sablaw.com](mailto:david.adelman@sablaw.com)  
[charles.jones@sablaw.com](mailto:charles.jones@sablaw.com)  
[frank.lomonte@sablaw.com](mailto:frank.lomonte@sablaw.com)

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Nanette S. Edwards, Esquire  
ITC^DeltaCom  
7037 Old Madison Pike, #400  
Huntsville, AL 35806  
[nedwards@deltacom.com](mailto:nedwards@deltacom.com)

